MALAYAN BANKING BHD.

v.

DATUK LIM KHENG KHIM [1]

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMED JC
[BANKRUPTCY NO. 29-513-89]
27 JANUARY 1992

BANKRUPTCY: *Petitioning creditor filed bankruptcy proceedings against judgment debtor - Receiving and adjudication order made against judgment debtor - Appeal by judgment debtor to Supreme Court - Appeal allowed as judgment notice was bad as interest not quantified - Petitioning creditor issued fresh bankruptcy proceedings - Judgment debtor filed affidavit disputing debt as figure grossly exaggerated - Petitioning creditor filed petition - Judgment debtor filed affidavit opposing creditor's petition - Whether decision of Supreme Court operates as res judicata against petitioning creditor from issuing fresh bankruptcy notice.*

On 25 January 1986 the petitioning creditor obtained judgment in default against Sing Pin Jih Pao Sdn. Bhd. and the judgment debtor. The petitioning creditor then commenced bankruptcy proceedings against the judgment debtor. On 20 June 1988 the High Court Penang made a receiving and adjudication order against the judgment debtor. The judgment debtor appealed to the Supreme Court and the appeal was allowed on the sole ground that the judgment notice was bad as interest was not quantified.

On 27 April 1989 the petitioning creditor issued a fresh bankruptcy notice and served the same on the judgment debtor on 2 May 1989. On 6 May 1989 the judgment debtor filed an affidavit pursuant to s. 3(2)(ii) Bankruptcy Act 1967 and r. 95 of Bankruptcy Rules 1969. On 20 October 1989, the petitioning creditor filed creditor's petition which was served on 29 November 1989. On 29 December 1989 the judgment debtor filed affidavit opposing the creditors petition on numerous grounds including disputing the amount of debt.

Held:

[1] The judgment debtor had not proved on the balance of probabilities that the sum stated in the bankruptcy notice was in excess of the amount of debt actually due at the time the bankruptcy notice was issued.

[2] The Court was satisfied that all the requirements of law had been satisfied by the petitioning creditor that the judgment debtor had not shown sufficient cause or valid reason why a receiving and adjudication order should not be made. In the circumstances, receiving and adjudication order was made against the judgment debtor.

[Receiving and adjudication order made against judgment debtor.]

Cases referred to:

Re Saloma Co; Ex-parte, Ipoh Radio Co. [1963] MLJ 46 ***(foll)***
Re Arunachalam; Ex-parte Indian Overseas Bank Ltd. [1968] 1 MLJ 89 ***(foll)***
Re Annie Lim [1987] 2 MLJ 276 ***(foll)***
Soh Bok Yew v. Cinder Dvpt. Sdn. Bhd. [1977] 1 MLJ 242 ***(dist)***
Malayan United Finance Bhd. v. Noormurni Sdn. Bhd. [1988] 1 CLJ (Rep) 190 ***(cit)***
Reebok International Ltd. v. Royal Corp. [1989] 2 CLJ (Rep) 1060 ***(cit)***
Chua Wee Seng v. Fezal Mohamed [1971] 1 MLJ 106 ***(cit)***

Government of Malaysia v. Dato' Chong Kok Lim [1973] 2 MLJ 74 ***(cit)***
Tractors Malaysia Bhd. v. Charles Au Yong [1982] CLJ (Rep) 355 ***(cit)***
In Re Victoria, Ex-parte Victoria [1894] 2 QB 387 ***(foll)***
Supreme Finance (M) Bhd. v. Koo Sin Ken [1987] CLJ (Rep) 349 ***(foll)***
Re Lennox [1985] QBD 315 ***(foll)***
Re Flatau [1988] 22 QBD 83 ***(foll)***
Re Fraser [1892] 2 QBS 633 ***(foll)***
In Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee [1988] 1 MLJ 304 ***(foll)***
Tan Sin Moh v. Lebel Ltd. [1988] 2 MLJ 51 ***(foll)***
Re Sebastian, ex-parte Metroplex Leasing and Credit Corpn. Sdn. Bhd. [1990] 3 MLJ 248 ***(foll)***
In re Majory [1955] 1 Ch 601 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), (2), (2)(ii), 5(1)(c), 6, 24
Bankruptcy Rules 1969, rr. 18, 95, (2), 117
Rules of the High Court 1980, O. 42 r. 12, O. 59 part II

Other source referred to:
The Law and Practice in Bankruptcy, Williams & Muir Hunter, 19th Edn., p. 38

For the petitioning creditor - Toh Lee Hong; M/s Lim Huck Aik & Co.
For the judgment debtor - Ooi Teik Hoe; M/s. Ooi Lee & Co.

JUDGMENT

Abdul Hamid Mohamed JC:

On 25 January 1986, Malayan Banking Bhd. (petitioning creditor), obtained a judgment in default against Sing Pin Jih Pao Sdn. Bhd. and the judgment debtor as follows:

> No appearance having been entered by the 1st and 2nd defendants herein, IT IS THIS DAY ADJUDGED that the 1st and 2nd defendants do pay the plaintiffs the sum of RM1,554,274.67 plus interest at the rate of 13.25% per annum on the Overdraft limit of RM800,000 and 14.25% per annum on excess amount (or at such other rate as shall be varied by the plaintiffs) as from 10 September 1985 until date of payment and the sum of RM369,689.10 plus further interest at the rate of 13.25% per annum as from 10 September 1985 until date of full payment and also the 1st and 2nd defendants do pay the sum of RM10,000 being legal professional charges and costs RM232.50.

Appeal to the Supreme Court was dismissed on 18 November 1987. The Supreme Court order reads as follows:

> THIS APPEAL coming up for hearing this day in the presence of Mr. Oliver Phipps (Mr. Ooi Teik Hoe with him) of Counsel for the Appellant and Ms. Liow Sook Ching of Counsel for the respondents AND UPON READING the Record of appeal filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that the Appeal be and is hereby dismissed with costs AND IT IS FURTHER ORDERED that the sum of RM500 deposited into Court by the Appellant as security for costs of this Appeal be paid to the Respondent to account for taxed costs.

The petitioning creditor commenced bankruptcy proceedings against the Judgment Debtor - *Vide* 43-500-86. On 20 June 1988, Dzaiddin J made a receiving and adjudication order against the judgment debtor. The judgment debtor appealed to the Supreme Court. The Supreme Court allowed the appeal on the sole ground that the Judgment Notice was bad as interest was not quantified.

a The petitioning creditor issued a fresh bankruptcy notice on 27 April 1989. The amount of the debt was quantified as follows:

1. Judgment Sum (Overdraft	RM1,554,274.67
Interest at the rate of 13.25% p.a. on the overdraft limit of RM800,000 as from 10 September 1985 to 27 April 1989	RM 385,084.91
b Interest at the rate of 14.25% p.a. on the excess amount as from 10 September 1985 to 27 April 1989	RM 331,663.82
2. Judgment sum (Trust Receipt A/C)	RM 369,698.10
c Interest at the rate of 13.25% p.a. as from 10 September 1985 to 27 April 1989	RM 177,952.13
Legal profession charges	RM 10,000.00
Costs	RM 232.50
d Less Payment to account	RM 224,983.85
Total amount owing as at 27 April 1989	RM2,603,913.28

The new bankruptcy notice was served on the judgment debtor on 2 May 1989. On 6 May 1989 the judgment debtor filed an affidavit (Encl. 3). Paragraphs 3 and 4 read as follows:

e 3. I deny and further dispute that I am indebted to the judgment creditors in the sum of RM2,603,913.28 as stated therein. In this respect I state that the figure is based on an erroneous calculation and grossly exaggerated.

4. In the premises, I am accordingly advised by my solicitors and verily believe that the bankruptcy notice is bad *ab initio* and I am therefore not obliged to comply with same. My solicitors will submit on points of law at the hearing.

f It is clear that this affidavit was filed pursuant to s. 3(2) proviso (ii) of the Bankruptcy Act 1967 and r. 95 of the Bankruptcy Rules 1969.

On 20 October 1989, that is, about 5½ months after the bankruptcy notice was served on the judgment debtor, the petitioning creditor filed the creditor's petition. It was served on 29 November 1989. On 29 December 1989, that is, almost seven months after the service of the g bankruptcy notice and exactly one month after the service of the creditor's petition, the judgment debtor filed a lengthy "affidavit in opposition" - Encl. 15. This "affidavit in opposition" which appears to be in opposition of the creditor's petition contains numerous grounds, including the dispute of the amount of debt already raised in Encl. 3.

The creditor's petition (Encl. 13) and the "affidavit in opposition" (Encl. 15) were fixed for h hearing a number of times both before my predecessor and before me. They were postponed several times, mainly on the application of one party or the other including for a settlement. When they were finally heard, both Counsel took almost two days to argue in great detail on the facts and citing numerous authorities. I reserved my judgment. In the course of preparing my judgment, I discovered that Encl. 3 had not been heard and disposed of.

i

From the file record, Encl. 3 was fixed for hearing only once before my predecessor, Wan Adnan J, on 30 August 1989 together with Encl. 6, a notice of motion filed by the judgment debtor for an order "that all further proceedings herein be stayed until after the judgment creditor shall have paid to the judgment debtor the costs directed to be paid by them to the judgment debtor by a decision of the Supreme Court of Malaysia dated 24 April 1989 in Civil Appeal No. 263 of 1988 ..." (that is, the appeal against the decision of Dzaiddin J in 43-500-86 mentioned earlier.)

However, on that day (30 August 1989) only Encl. 6 was heard. The order made by Wan Adnan J, regarding Encl. 6 was "application is dismissed with costs". From then on, Encl. 3 was not fixed again for hearing. Neither was there any request by either party to have it fixed for hearing. Record also does not show that the Registrar extended the time for its hearing pursuant to r. 95(2). The petitioning creditor filed the creditor's petition (Encl. 13) about two months after that and the judgment debtor filed the "affidavit in opposition" (Encl. 15) one month after the petition was served.

I invited both learned Counsel to my chambers to point out the position to them. They both agreed that I should decide on Encl. 3 as well, as the dispute as to the amount of debt was argued in great detail, purportedly under Encl. 15.

To my mind, as one of the applications fixed before me and heard by me was for a receiving and adjudication order against the judgment debtor, I cannot ignore Encl. 3.

As I have mentioned earlier, Encl. 3 is an affidavit disputing the amount of debt on the bankruptcy notice. It was filed pursuant to s. 3(2) proviso (ii) of the Act and r. 95 of the Bankruptcy Rules 1969. It was filed "within the time allowed for payment" that is, seven days. It had not "been heard and determined." In the meantime creditor's petition was filed and served. The creditor's petition was undoubtedly filed within six months from the expiry of the period allowed for payment in the bankruptcy notice.

Section 3(2) of Bankruptcy Act 1967 provides:

> (2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:
>
> Provided that a bankruptcy notice:
>
> (i) ...
>
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

At this juncture, perhaps I should also reproduce the provisions of r. 95 of the Bankruptcy Rules 1969:

> 95. Application to set aside.
>
> (1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

In other words, a bankruptcy notice may be challenged and set aside on the ground that the amount therein stated exceeds what is actually due, by giving a notice to that effect within seven days of the service of the bankruptcy notice.

Enclosure 3

Enclosure 3 is an affidavit in which the judgment debtor disputed that he was indebted to the judgment creditor in the sum of RM2,603,913.26 stated in the bankruptcy notice. Enclosure 3 itself gives no particulars. But particulars are given in the "affidavit in opposition" - Encl. 15. In deciding on Encl. 3, I shall refer to the portion in Encl. 15 which is relevant to the ground raised in Encl. 3, and treat it as a further affidavit.

There is no doubt that if the allegation is proved, the bankruptcy notice is invalid - see *Re Saloma Co.; Ex-parte, Ipoh Radio Co.* [1963] MLJ 46 and *Re Arunachalam; Ex-parte Indian Overseas Bank Ltd.* [1968] 1 MLJ 89.

Learned Counsel for the judgment debtor said that the amount debt as at the date the bankruptcy notice was issued should be less than the sum of RM2,603,913.28 stated therein.

First, he said that had the receivers collected the company's (1st defendant's) debt and sold the company's machinery at a good price, the debt would have been less.

The learned Counsel pointed out that there was a debt owed to the company by various debtors to the amount of RM1,260,567.99. He also pointed out that the machines were sold at RM410,000 but only RM224,983.85 was taken into account. Lastly he said various payments were made, unjustificably, to the receivers as well as solicitors of the judgment creditor.

Learned Counsel also drew the Court's attention to the fact that the company and the judgment debtor had filed two suits, one against the receivers for negligence and one against the petitioning creditor for being vicariously liable for the negligence of the receivers. These suits were filed.

By way of clarification, it should be noted here that after obtaining judgment against the company (1st defendant) and the judgment debtor (2nd defendant), the petitioning creditor had caused receivers and managers to be appointed. The petitioning creditor also commenced bankruptcy proceedings against the judgment debtor.

It was argued by learned Counsel for the judgment debtor that had the receivers collected the company's debts from various debtors, the debt that the company and the judgment debtor to the petitioning creditor would be less. I think there is no merit in this argument. We know how difficult it is to collect debts. This case itself is a good example. The point is that the debts had not been collected and the amount cannot therefore be reduced from the total sum the judgment debtor was indebted to the petitioning creditor at the time the bankruptcy notice was issued. The bankruptcy notice is not bad on that ground.

Next, it was argued that had the company's machinery been sold at a good price by receivers, the judgment debtor's debt to the judgment creditor would also be less. In my judgment, there is no merit in this argument too. That argument is nothing more than mere speculation.

Learned Counsel for the judgment debtor also complained that even though the machines were sold for RM410,000 only RM224,983.85 was credited to the company's account, the balance apparently being paid out to receivers and to solicitors of the judgment creditor. To this complaint, first it cannot be denied that costs would be incurred by the receivers in selling the machines, and fees would have to be paid. Anyway, I am not saying, at this stage, whether the payments to the receivers and the solicitors are justified or not. Indeed I am not saying one way or the other, at this stage, whether the receivers were negligent or not and whether the judgment debtor was vicariously liable or not. That is, a matter to be determined upon the hearing of the two suits filed by the company and the judgment debtor against the receivers and the petitioning creditor.

The question is whether, the filing of those two suits, and the allegations therein are sufficient reasons for declaring that that sum specified in the bankruptcy notice was in excess of the amount actually due. The judgment debtor had, so far, not proved his allegations. Indeed they can only be proved, if at all, at the hearing of the two suits. Until then, I do not think it is correct for the Court to come to a definite conclusion that the sum stated in the bankruptcy notice exceeded the amount actually due. That would be pre-judging the two suits.

The other point advanced by learned Counsel for the judgment debtor for saying that the sum stated in the bankruptcy notice exceeded the actual amount due was that the calculation of the interest was wrong. According to him interest at 13.25% amounted to RM385,060.39, not RM385,084.91 a difference of RM24.52.

I have no reason to doubt the calculation of the petitioning creditor, a bank.

It was also argued by learned Counsel for the judgment debtor that the costs of RM232.50 was in excess of what the judgment creditor was entitled to. He said that the judgment creditor was only entitled to RM225 under O. 59 item (b), part 2 of the Rules of the High Court 1980. It should be noted that the difference here is RM7.50. On this point it should be noted that the sum of RM232.50 was the amount of costs awarded. It is clearly stated in the order of Court, which was confirmed by the Supreme Court. That judgment stands. In an application to set aside a bankruptcy notice the Court cannot go behind the judgment and inquire into the validity of the debt, as it can in a petition: *Re Annie Lim* [1987] 2 MLJ 276. Therefore this ground too has no merits.

In conclusion, I am of the view that the judgment debtor had not proved on the balance of probabilities that the sum stated in the bankruptcy notice, was in excess of the amount of debt actually due at the time the bankruptcy notice was issued. Enclosure 3 is dismissed with costs.

ENCLOSURE 15: RE BANKRUPTCY NOTICE

Enclosure 15 is an "affidavit in opposition" and filed one month after the creditor's petition was served on the judgment debtor. By right it should be a notice to show cause pursuant to r. 117. But it also contains attacks on the bankruptcy notice, including on grounds raised in Encl. 3, besides new grounds. It also contains grounds why the creditor's petition should be dismissed.

Learned Counsel for the petitioning creditor submitted, on a preliminary objection, that the affidavit should be dismissed because, first, it was not an affidavit showing that the judgment debtor had a counter-claim, set-off or cross demand. Secondly, because the procedure adopted was wrong. It should be by way of a motion, she said. She referred me to r. 18 which reads:

18. Applications to be made by motion.

Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Court otherwise directs, be made by motion supported by affidavit.

She also referred me to the passage in Williams and Muir Hunter, *The Law and Practice in Bankruptcy* l9th Edn., at p. 38 which reads:

(b) On grounds other than set-off, etc.

The debtor may apply by motion (that is, not by the summary affidavit procedure of B.R. 139) to set aside the **notice** on other grounds, example, irregularity, bad service, payment (or *quaere* legal tender) of the debt, etc.; the time limit of seven days now fixed by B.R. 138 does not apply to such applications.

The law as I understand it is, if a judgment debtor intends to satisfy the Court that there is a counter-claim, set off or cross demand, he must file an affidavit within seven days of the service of the bankruptcy notice on him s. 3(1)(i) and r. 95. Similarly, if he intends to dispute the sum stated in the bankruptcy notice as the amount due, he has to give notice to that effect (usually by affidavit), also within seven days - s. 3(2) proviso (ii) and r. 95. If he intends to object to the bankruptcy notice on other grounds, then he has to do it by way of a motion and the seven day period is not applicable. When the petition is issued and served, if the judgment debtor intends to show cause against the petition, then he has to file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

Unfortunately, in this case, the judgment debtor sought to do everything mentioned above by filing Encl. 15. Clearly the challenge to the amount due as stated in the bankruptcy notice should not be raised in Encl. 15 as that had been done by filing Encl. 3. Indeed it cannot now be done because the seven day period had long expired.

Challenges to the bankruptcy notice on the ground that the judgment debtor had a counter-claim, set-off or cross demand and contained in Encl. 15 should be disregarded. Because, that should have been done by filing an affidavit within seven days of the service of the bankruptcy notice.

Challenges to the bankruptcy notice on other grounds example, the amount due was not quantified, the quantification did not follow the terms of the judgment in default should be disregarded. Because, had the judgment debtor wanted to challenge the bankruptcy notice on these grounds he should have filed a notice of motion supported by an affidavit.

However, in case I am wrong on this last-mentioned point, let me now deal with them.

Amount Due Not Quantified

As I have stated at the beginning of this judgment, the Supreme Court had decided that the judgment notice issued against the judgment debtor in the earlier proceeding was bad on the ground that the interests were not quantified. The petitioning creditor then issued a fresh bankruptcy notice in which the debt was quantified as I have reproduced above.

Learned Counsel for the judgment creditor, referring to para. 1 of the quantification table argued that the "excess amount" was not stated. What was stated was only the **interest** on the excess amount.

Clearly, there is no merit in this argument. What the petitioning creditor was claiming was the interest on the excess amount. Therefore, so long as the interest on the excess amount was quantified, it is sufficient.

Quantification does not follow the Judgment

Learned Counsel for the judgment debtor argued that the quantification of the interest at 13.25% on the overdraft of RM800,000 was not in accordance with the terms of the judgment because the calculation was wrong. Actually, this is the same ground as that raised in Encl. 3 which I have dealt with, except that it is now said differently. I have dealt with this point when considering Encl. 3. I shall not repeat.

Whether a Receiving and Adjudication Order Should Be Made

I shall now consider whether a receiving and adjudication order or what other order should be made. In so doing I shall have to consider Encl. 13, Encl. 15 and also the validity of the creditor's petition which was filed before Encl. 3 was heard and determined.

Validity of the Creditor's Petition

Enclosure 3 is an affidavit filed under s. 3(2) proviso (ii) and r. 95. Rule 95(2) clearly states that "no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined."

Section 5 of the Act provides:

> 5(1) A creditor shall not be entitled to present a bankruptcy petition against debtor unless -
>
> (a) ...
>
> (b) ...
>
> (c) the act of bankruptcy on which the petition is grounded **has occurred** within six months **before the presentation of the petition.**

In the *Law and Practice in Bankruptcy* by Williams and Muir Hunter l9th Edn., at p. 1, the learned authors in explaining the provision of s. 4(c) of the English Act, which is in *pari materia* with our s. 5(c) except that under the English Act the period is three months instead of six months, say as follows:

> The commission by the debtor of at least one act of bankruptcy is the fact which gives the bankruptcy Court jurisdiction to make a receiving order in respect of his estate, and is to be treated as a statutory recognition of his insolvency. **Such an act of bankruptcy must be proved to have been committed within three months before the presentation of the petition** (*vide* s. 4, post, p. 43), and any act so proved must be recited in the receiving order.

Reading these provisions, I would have thought that only after Encl. 3 is heard and determined that the petitioning creditor would be entitled to present the creditor's petition. To do so earlier would mean to present the creditor's petition **before** an act of bankruptcy is committed. A creditor's petition so presented is premature and defective and should be dismissed.

However, in the course of my research, I came across a decision of the Federal Court in *Soh Bok Yew v. Cinder Devpts. Sdn. Bhd.* [1977] 1 MLJ 242 which says differently.

What had happened in that case is somewhat similar to what had happened in this case. In that case the bankruptcy notice was issued on 24 March 1975. It was served on the judgment debtor on 4 April 1975. The seven day period would have lapsed on 11 April 1975. However

on 11 April 1975 itself and still within the period of seven days the judgment debtor filed an affidavit stating that he had a cross demand. The Registrar did not fix it for hearing within the seven days, nor did he make any order extending the time. The affidavit (application to set aside the bankruptcy notice - "application") was postponed a number of times. Finally on 7 June 1976, the learned trial Judge heard and dismissed the application. Having done that he "immediately" considered the Bankruptcy Petition and made a receiving and adjudication order. Even though the judgment is silent, by necessary implication, it is clear that the creditor's petition was presented and served **before** the application was heard and determined. Otherwise the learned trial Judge could not have considered the petition immediately after dismissing the application.

The Federal Court held that what the learned trial Judge did was not wrong and upheld the receiving and adjudication order he made. As I understand it, the Federal Court was of the view that the act of bankruptcy was committed the moment the learned trial Judge dismissed the application and therefore the learned trial Judge was right in making a receiving and adjudication order immediately after dismissing the application.

However, what the Federal Court, with respect, appears to have failed to consider was whether a creditor's petition could be filed **before** the act of bankruptcy was committed.

As this judgment is binding on me, I have no alternative but to follow it.

So I shall now proceed to consider the grounds raised in Encl. 15 in opposing the petition.

Perhaps I should, at this stage, reproduce the provisions of ss. 6 and 24 of the Act:

> 6. Proceedings and order on creditor's petition
>
> (1) ...
>
> (2) At the hearing the Court shall require proof of -
>
> (a) the debt of the petitioning creditor; and
>
> (b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, someone of the alleged acts of bankruptcy; and
>
> (c) if the debtor does not appear, the service of the petition,
>
> and if satisfied with the proof may make a receiving order in pursuance of the petition.
>
> (3) If the Court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition.
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> 24. Adjudication of bankruptcy
>
> (1) At the time of making a receiving order the Court shall adjudge the debtor bankrupt unless the debtor can show to the satisfaction of the Court that he is in a position to offer a composition or make a scheme of arrangement satisfactory to his creditors;

A number of grounds were advanced as to why a receiving and adjudication order should not be made. I shall deal with them one by one.

Res Judicata

Learned Counsel for the judgment debtor argued that the petitioning creditor was estopped from commencing the present bankruptcy proceeding against the judgment creditor because earlier on a receiving and adjudication order had been made by the High Court but set aside

by the Supreme Court. However, he conceded that the order of the High Court was set aside on the sole ground that the bankruptcy notice was defective since the amount of interests were not quantified.

He cited the following authorities:

(a) *Malayan United Finance Bhd. v. Noormurni Sdn. Bhd.* [1988] 1 CLJ (Rep) 190;

(b) *Reebok International Ltd. v. Royal Corpn.* [1989] 2 CLJ (Rep) 1060;

(c) *Chua Wee Seng v. Fezal Mohamed* [1971] 1 MLJ 106;

(d) *Government of Malaysia v. Dato' Chong Kok Lim* [1973] 2 MLJ 74;

(e) *Tractors Malaysia Bhd. v. Charles Au Yong* [1982] CLJ (Rep) 355.

Clearly these authorities are not on point as none of them is a bankruptcy case. I asked the learned Counsel if he could show me an authority which supported his contention. He admitted he could not. I am of the view that the decision of the Supreme Court on the earlier order made by Dzaiddin J in the earlier proceeding, on the ground that it (the Supreme Court) did, does not operate as *res judicata* against the petitioning creditor from issuing a fresh bankruptcy notice. The matter is *res judicata* as regards the earlier notice, not a fresh notice - see *In Re Victoria, Ex-parte Victoria* [1894] 2 QB 387.

This ground fails.

Judgment Irregular

Learned Counsel for the judgment debtor urged the Court to go behind the judgment because, he said, the judgment was irregular. He drew my attention to that part of the judgment which reads:

> ... plus interest at the rate of 12.35% per annum on the overdraft limit of RM800,000 and 14.25% per annum of excess amount ... as from 10 September 1985 until date of payment and the sum of RM369,689.10 plus further interest at the rate of 13.25% per annum as from 10 September 1985 until date of full payment ...

He said that the granting of interest at 13.25% and 14.25% per annum was irregular because O. 42 r. 12 of the Rules of the High Court, as was operative at that time, only allowed interest not exceeding 8% from the date of the judgment until the date the judgment is satisfied. The amendment of r. 12 which allows parties to agree to a higher rate only came into force on 12 December 1986 which was **after** the judgment was obtained (25 January 1986).

I agree that in this case the interest after judgment should not exceed 8% - see *Supreme Finance (M) Bhd. v. Kow Sin Kee* [1987] CLJ (Rep) 349 SC, a decision of the Supreme Court which is binding on me.

However, the question is whether I should go behind the judgment.

Let me now discuss the relevant authorities on this point. I shall take the English cases first.

In *Re Lennox* [1985] QBD 315, it was held (I shall only quote the headnote):

> The Court of Bankruptcy has power to go behind a judgment and inquire into the consideration for the judgment debt, not only at the instance of the trustee in the bankruptcy of the debtor upon the question of the proof of the debt, but also at the instance of the judgment debtor himself upon the hearing of a petition by the judgment creditor for a receiving order, even though the debtor has consented to the judgment; and, if on the hearing of the petition facts are alleged by the debtor, of which evidence is tendered, and which, if proved,

would show that, notwithstanding the judgment, there is, by reason of fraud or otherwise, no real debt, the Court ought not to make a receiving order without first inquiring into the truth of the debtor's allegations.

In *Re Flatau* [1988] 22 QBD 83, it was held (again I shall only quote the headnote):

> The Court of Bankruptcy will not, as a matter of course, inquire into the validity of a judgment debt, but only when there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice.

In *Re Fraser* [1892] 2 QBS 633 it was held (again I shall only quote the headnote):

> Upon the hearing of a creditor's petition for a receiving order against a judgment debtor, the Court of Bankruptcy has power, at the instance of the debtor himself, to go behind the judgment and to inquire into the validity of the debt, even though the debtor has previously applied in the action to set aside the judgment, and his application has been refused, and the refusal affirmed by the Court of Appeal.

It is pertinent to note that what had happened *In Re Fraser* is somewhat similar to what had happened in this case in that in that case, as in this case, there was an application to set aside the judgment which was refused and the application was affirmed by the Court of Appeal (here by the Supreme Court).

I shall now consider the Malaysian authorities. *In Sovereign General Insurance Sdn. Bhd v. Koh Tian Bee* [1988] 1 MLJ 304, a decision of the Supreme Court, it was argued that the previous execution proceeding was irregular because the notice of sale was not properly served on the judgment debtor and that he was unable to contest the proceedings. The Supreme Court rejected the argument. Delivering the judgment of the Court, Lee Hun Hoe CJ (Borneo) said at p. 305:

> An irregularity or formal defect in the judgment is no sufficient reason for going behind it: *Re Beauchamp.* As a general principle, the validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice: *Re Flatau*; *Re Howell.*

In *Tan Sin Moh v. Lebel Ltd.* [1988] 2 MLJ 51, again a decision of the Supreme Court, it was alleged that the judgment contained a "material error" in respect of the registered particulars in the Registry of Businesses, which had influenced the Judge to enter judgment against the judgment debtor. Again the argument was rejected. Wan Suleiman SCJ, delivering judgment of the Court said at p. 52:

> The learned Judge was, with respect, correct in not finding any evidence of fraud, collusion or miscarriage of justice, and indeed in declining to apply his discretion on the principle enunciated in *In Re Flatau.*

Re Sebastian, ex-parte Metroplex Leasing and Credit Corpn. Sdn. Bhd. [1990] 3 MLJ 248, is an illustration where the Court of bankruptcy inquired into the validity of the judgment on which the bankruptcy proceeding was founded even though the judgment debtor had previously applied to set aside the judgment and his application was refused and affirmed on appeal. In that case, it should be noted that the contract on which the judgment was obtained and the bankruptcy proceeding founded was void because it "ran foul" of an express statutory prohibition, because the petitioning creditor had no licence to sell or dispose the subject matter of the contract, as required by the relevant law.

I shall now try to summarise the law from the authorities. It seems to me that:

(a) a bankruptcy Court has power to go behind a judgment on which the bankruptcy proceeding is founded if there is evidence of fraud, collusion or miscarriage of justice;

(b) an irregularity or formal defect is no sufficient reason for going behind the judgment;

(c) a bankruptcy Court may go behind a judgment if it is founded on a contract which is void because it is contrary to an express statutory provision;

(d) a bankruptcy Court may go behind a judgment and inquire into the validity of the judgment even if an application to set aside the judgment had been made, dismissed, and affirmed by a Court superior to the bankruptcy Court.

In this case, there is no allegation of fraud or collusion. There is no complaint against the judgment sum. The complaint is only against the rate of interest awarded. It cannot be denied that the rates of 13.25% and 14.25% are more than the rate permitted by the Rules of the High Court 1980 at the relevant time. In a way, it can be said to be similar to the situation in *Re Sebastian.* Yet it is distinguishable from *Re Sebastian* because, in that case, the contract was void, the whole judgment debt ceased to exist. The situation in *Re Sebastian* [1990] 3 MLJ 248 was somewhat similar to that in *Ex-parte Lennox* [1985] QBD 315 where if the allegations were proved, there would be no debt at all. It is not so here. The judgment sum proper is not challenged and remains a judgment debt. Only the amount of interest after judgment is affected. However, looking at it in one way, there is undoubtedly a "miscarriage of justice" to the judgment debtor because he has to pay more in the form of interest after judgment than what was allowed by law. But, on the other hand, it would also be a "miscarriage of justice" to the petitioning creditor if he is left with a judgment of the highest Court in this country in his hands but which he cannot use to found bankruptcy proceeding. I confess I am in a dilemma.

In the circumstances, perhaps I should take the cue from the decision of the Federal Court in *Soh Bok Yew's* [1977] 1 MLJ 242 case and consider whether "the ends of justice" would be defeated, if I were to decide one way or the other.

Considering the circumstances of this case, I am of the view that it would be a greater miscarriage of justice and the ends of justice would be defeated if I were to hold that the judgment which was confirmed by the Supreme Court cannot be used to found a bankruptcy proceeding just because the interest after judgment awarded was more than it should. But, in the interest of justice also, perhaps, the excess amount should be reduced later by the Official Assignee, if a receiving and adjudication order is made. I confess I have no authority to support me here. I am relying solely on fairness and common sense.

In conclusion I do not think the mistake in the judgment is a sufficient reason for me to hold that the whole judgment cannot be used to found a bankruptcy proceeding.

The above discussion and conclusion is also applicable to the complaint that the costs awarded should be RM225 and not RM232.50 (a difference of RM7.50) which I have also considered under Encl. 3.

Guarantee Void

In paras. 5 to 8 of Encl. 15, the judgment debtor urged this Court to go behind the two judgments because he said the guarantee on which the judgment against the judgment debtor was founded, was void. However, in the course of his argument, learned Counsel for the judgment debtor said that that part of the affidavit was only meant to show the background of the case. So, I do not have to consider whether I should go behind the judgment on this ground.

Sufficient Cause: Negligence of Receivers and Collusion With Judgment Debtor

This point is the same as what I have discussed when considering Encl. 3. I shall not repeat. All that I will say here is that it is a matter to be decided at the end of the trial of the two suits and, at this stage, I am not satisfied there was "collusion" between the petitioning creditor and the receivers.

Sufficient Cause: Conduct of Petitioning Creditor

Learned Counsel for the judgment debtor argued that the conduct of the petitioning creditor in commencing this bankruptcy proceeding against the Judgment debtor is unconscionable and *mala fide*. First, he said the petitioning creditor had deliberately appointed receivers and managers to manage the company which culminated in grave financial losses to the company and the judgment debtor. It had done more harm than good. It had aggravated and restricted any opportunity he might have had to secure loans from other financial institutions to settle the debt actually due, if any.

Secondly, the judgment debtor, in his affidavit (Encl. 15) said on 3 December 1986, Forward Group Sdn. Bhd., of which he was chairman had offered to settle the debts by paying an initial payment of RM200,000 to be followed by monthly instalments of RM50,000 Exhibit I of Encl. 15. This was not acceptable to the petitioning creditor "unless adequate securities are offered to the Bank, the publishing permit is returned to Sing Pin Jih Pau Sdn. Bhd. and all defence and counter-claim against the bank are withdrawn." Learned Counsel for the judgment debtor argued that the conditions required were unreasonable and *mala fide*.

For these reasons, learned Counsel for the judgment debtor urged the Court not to make a receiving and adjudication order or alternatively stay this bankruptcy proceeding or, as a further alternative, make a receiving order but not an adjudication order.

I have considered all these grounds. I am of the view that they do not constitute sufficient cause for the Court to dismiss the petition. I do not think the conduct of the creditor's petition amount to "extortion". Perhaps, the clearest statement of law regarding "extortion" in bankruptcy proceeding is to be found in *In re Majory* [1955] 1 Ch 601. The head note of that case reads:

> (3) That while, in general, Court proceedings, whether bankruptcy or otherwise, could not be used to obtain for a person some collateral advantage, and a party so using them would be guilty of abusing the process of the Court, in bankruptcy proceedings the Court would always look strictly at the conduct of the creditor using or threatening such proceedings, and if it concluded that he had acted oppressively the Court would not hesitate to declare the creditor's conduct extortionate and would refuse to allow him to make use of the process.

On the evidence before me, I am not satisfied that this proceeding was used by the petitioning creditor to obtain any "collateral advantage", or that the petitioning creditor is guilty of abusing the process of the Court or had acted oppressively, unconscionably or *mala fide*. I do not think it is for this Court to tell the petitioning creditor that they should accept the offer to settle the debt by instalment payments. I do not think it is for this Court to tell the petitioning creditor that they should not impose conditions for accepting such an offer, or what conditions should and should not be imposed. As regards the appointment of receivers and managers of the company, it is a matter between the petitioning creditor and the company. The company could have challenged such appointment when it was applied. The fact is that the receivers and managers were legally appointed. If the the receivers and managers had been guilty of negligence in the discharge of their duties, as alleged, that

again is a matter between them and the company. The company has rightly sued them. It is premature to decide at this stage. To say that their appointment had aggraved and restricted the judgment debtor's opportunity to obtain loans to settle the debt is nothing more than mere speculation.

Conclusion

Enclosure 3 is dismissed.

I would have dismissed the creditor's petition on the ground that it was presented before the act of bankruptcy was committed since it was presented before Encl. 3 was heard and determined. However, on the authority of *Soh Bok Yew* [1977] 1 MLJ 242 a decision of the Federal Court, which is binding on me, I considered the creditor's petition (Encl. 13) and the affidavit in opposition (Encl. 15). I am satisfied that all the requirements of law had been satisfied by the petitioning creditor and that the judgment debtor had not shown sufficient cause why a receiving and adjudication order should not be made. I am also of the view that there is no valid reason why the proceeding should be stayed or only a receiving order be made and not an adjudication order. In the circumstances I hereby make a receiving and adjudication order against the judgment debtor.

Also found at [1992] 3 CLJ 1449